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Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

v.

MICHAEL W. MOORE, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AND THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AMERICAN SECTION) ("IAJLJ") AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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I

INTEREST OF THE AMICI CURIAE[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed numerous *amicus curiae* briefs in this Court on issues of concern to the Orthodox Jewish community.

The International Association of Jewish Lawyers and Jurists ("IAJLJ") is an organization whose membership is drawn from more than 30 countries. The Association was formed in 1969 in Jerusalem at the First International Congress of Jewish Lawyers and Jurists. Former Justice of the United States Supreme Court and United Nations Ambassador Arthur J. Goldberg was elected president. The American Section of the IAJLJ represents the American Jewish legal community, defending Jewish interests and human rights in the United States and abroad.

COLPA and IAJLJ are vitally interested in promoting the study of, and respect for, principles of Jewish Law as they have been applied throughout the history of the Jewish people. COLPA and the national groups that it routinely represents promote and encourage in-depth study of Talmudic texts. IAJLJ has sponsored public lectures in Jewish Law and promoted the publication of scholarly essays in the field of Jewish Law.

COLPA and IAJLJ are submitting this *amicus curiae* brief to advise the Court how questions concerning the *mode*

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[1] No party or party's counsel authored this brief in whole or in part, and no person or entity other than the *amici curiae*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief. See Rule 37.6.

of execution were resolved in the oldest and most venerable legal system known to man. The Jewish legal system – based on Biblical text, oral tradition, and rabbinic interpretation – considered and discussed the implementation of the death penalty. At first blush, the means prescribed by Jewish Law for the execution of an individual who is condemned to death by a duly authorized court seem cruel and insensitive to the pain and disfigurement that accompanies the death of the accused. But a close examination of the rabbinic interpretation of the Biblical text discloses that approximately 2000 years ago the rabbis of the Talmud agreed that execution must be carried out quickly and as painlessly as possible. They also agreed that an execution should not mutilate or disfigure the body of the condemned person. The relevant passages from the Talmud demonstrate that the rabbis sought -- with the scientific knowledge and means available to them in their time -- to formulate the quickest, least painful, and least disfiguring methods of execution that the technology of the day would allow within the framework of Biblical texts.

Guidelines consistent with those set forth by the rabbis of the Talmud appear to emerge, as well, from the language of this Court's recent decisions relating to capital punishment. This *amicus* brief therefore supports the proposition that, separate and apart from the issue of capital punishment itself, a particular method of administering capital punishment that fails the standards of rapid and painless death and that results in mutilation or disfigurement should today be unacceptable under the evolving standards of human decency mandated by the Eighth Amendment.

This *amicus* brief describes the methods of execution prescribed by Jewish Law. The details of these methods (which may appear unusual to modern society) are described *not* for comparison with means of execution under contemporary standards. Our point is that the principles

through which they were formulated can serve as a guide. It is clear that the rabbis sought to administer the most humane forms of capital punishment then available. These principles should be applied by this Court to evaluate whether execution by the electric chair, as administered in Florida, results in unnecessary pain and disfigurement. If electrocution, as currently administered, results in needless pain and mutilation, it would not meet the rationale of Jewish Law as administered 2000 years ago and should not be acceptable today under the evolving standards of the Eighth Amendment.

ARGUMENT

Introduction

Capital punishment is a penalty prescribed by Biblical law for the commission of offenses that violate ritual prohibitions (such as deliberate desecration of the Sabbath) as well as laws regarding interpersonal relationships (murder, kidnapping, incest). The Biblical text explicitly specifies two forms of execution: stoning (*Exodus* 17:4, 8:22; *Numbers* 14:10) and burning (*Leviticus* 20:14, 21:9). The oral tradition includes two additional means -- strangulation and decapitation.

Although the Biblical text appears to contemplate frequent imposition of capital punishment, the weight of authority among rabbis of the Mishnaic period (1st-3rd centuries of the Common Era), who first committed to writing what had theretofore been transmitted from generation to generation as the Oral Law, clearly condemned

frequent executions. The Mishna[2] in the tractate *Makkoth* (7a) declared:

> The Sanhedrin[3] that executes one person in seven years is called "murderous." Rabbi Elazar ben Azariah says that this extends to one execution in seventy years. Rabbi Tarfon and Rabbi Akiva say, "If we had been among the Sanhedrin, no one would ever have been executed." Rabbi Simon ben Gamliel responds, "Such an attitude would increase bloodshed in Israel."

This exchange among rabbis living in the first and second centuries reflects differences over the deterrent value of capital punishment that continue among legal scholars to this day. Some rabbis of the Mishnaic period (such as Rabbis Tarfon and Akiva) were unwilling to participate in a process that would take human life, while other rabbis (like Rabbi Simon ben Gamliel) believed that capital punishment had a deterrent effect that permitted it to be employed.

The infrequency of the death penalty was attributable to the meticulous application of stringent rules regarding the admissibility and sufficiency of evidence. A court of at least

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[2] The Mishna is "the collection of mostly halachic Jewish traditions compiled about A.D. 200 and made the basic part of the Talmud." *Merriam Websters' Collegiate Dictionary* (10th ed. 1993). The Talmud, which was compiled in the Fifth Century, is the authoritative body of Jewish tradition and is comprised of the "Mishna" and the "Gemara."

[3] The Sanhedrin was the "supreme legislative council and highest ecclesiastical and secular tribunal of the Jews, consisting of 71 members and exercising its greatest authority from the Fifth Century B.C. to A.D. 70." *Webster's Encyclopedic Unabridged Dictionary of the English Language* (1989).

23 judges would have to be satisfied, to a legal certainty, that the capital offense had been committed before the court could impose a death sentence. Since the testimony of two eye-witnesses was required, and the witnesses were subjected to searching and detailed interrogation by the court, there was rarely an instance when the evidence met the prescribed legal standard. *See* Maimonides, *Mishneh Torah, Book of Judges, Sanhedrin*, chapter XII.[4]

By Talmudic prescription and the rulings of Jewish-law codifiers through Maimonides, the particular form of execution to be administered under Jewish law depended upon the nature of the offense. Each of these forms, however, had to be administered in the most humane manner possible.

This *amicus* brief does not address the question of whether all capital punishment should today be rejected as "cruel and unusual" punishment. That question is not before the Court in this case. Our brief addresses only the question whether the mode of execution employed by Florida renders capital punishment "cruel and unusual" in that State. This brief accordingly reviews rabbinic doctrines and discussion regarding the *methods* used in implementing the death penalty.

It is striking, we submit, that in prescribing methods for imposition of the death penalty almost two millennia ago,

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[4] Rabbi Moses ben Maimon (also known as Maimonides) was a rabbinic authority and leading early codifier of Jewish Law. Born in Spain in 1135, he settled first in Morocco and then in Egypt, and died in 1204. His 14-volume work, called *Mishneh Torah*, is viewed as the earliest enduring codification of Jewish Law. Maimonides also served as a royal physician and a philosopher. He is also the author of a leading Jewish philosophical work called *Moreh Nevuchim* ("The Guide to the Perplexed").

the rabbis of the Talmud were concerned about the same factors that have emerged from this Court's Eighth Amendment jurisprudence. Primary concerns under Talmudic law are (1) the prevention of unnecessary pain and (2) avoidance of mutilation or dismemberment of the body. As discussed below, the four means of execution described in the Talmud were designed to utilize the most effective technology and scientific knowledge available at the time, to minimize the pain of the person who was being put to death, and to avoid mutilation of his or her body. The methods described in the Talmud, therefore, differ significantly from what is commonly assumed from a reading of the Biblical text.

The conclusions regarding Jewish Law that we summarize in this brief were expressed in an opinion issued by the then Deputy President of the Supreme Court of Israel, the Honorable Menachem Elon, in *State of Israel v. Tamir*, 37(iii) P.D. 201 (1983). Justice Elon, who is now retired from the Israeli Supreme Court, has reviewed the text of this *amicus* brief and authorized us to state that he concurs with its conclusions.[5]

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[5] Counsel note that Justice Elon is the world's foremost modern legal authority on "Mishpat Ivri" – legal principles derived from traditional Jewish Law. His comprehensive treatise, *Ha-Mishpat Ha-Ivri*, was published in Israel in 1973, before he was appointed a Justice of the Supreme Court of Israel, and republished in 1978 and 1988. Elon, *Ha-Mishpat Ha-Ivri* (Magnes Press, The Hebrew University, Jerusalem, 1973). It was translated into English and published in four volumes in 1994 by the Jewish Publication Society. Menachem Elon, *Jewish Law: History, Sources, Principles*, (Bernard Auerbach and Melvin J. Sykes trans., Jewish Publication Society, Philadelphia, 1994)

I

THE BIBLICAL OBLIGATION TO BE SENSITIVE TO FELLOW HUMAN BEINGS LED THE RABBIS TO PRESCRIBE THE LEAST PAINFUL AND LEAST DISFIGURING MEANS FOR IMPLEMENTING THE FOUR FORMS OF EXECUTION

A casual reader of the Biblical text might assume that the execution described as "stoning" is carried out by hurling stones at the condemned individual until he dies from the force of the objects thrown at him and that "burning" is accomplished by subjecting the condemned to a burning flame after tying the condemned to a stake or casting him or her on a funeral pyre. The oral tradition, however, as explicated by the rabbis of the Talmud demonstrates that neither of these descriptions is the "stoning" and "burning" envisioned by the Bible.

A. "Stoning" Was Intended To Be a Quick and Relatively Painless Form of Non-disfiguring Execution.

The Mishna in tractate *Sanhedrin* (45a) describes execution by "stoning." The condemned defendant was pushed from a platform set high enough above a stone floor that his fall would probably result in instantaneous death.[6]

The Talmud explains that the height from which the accused was pushed was substantial enough that death was

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[6] We reproduce, as Amicus App. A, pp. 1a -- 30a, *infra*, copies of the relevant pages of *Talmud Bavli*: *Sanhedrin* (Mesorah Publications, Inc., 1994) with the permission of the publisher.

virtually certain. Providing for an immediate death was, according to the Talmud, derived from the Biblical commandment (*Leviticus* 19:18), "You shall love your fellow as yourself." This commandment requires a court to select for a condemned man a humane (*i.e.*, painless) death (*Sanhedrin* 45a). Rashi, the leading medieval commentator on the Talmud,[7] explained that when the Talmud says a "humane death" it means a "quick death."

The continuation of the discourse in *Sanhedrin* reveals that the rabbis' ultimate concern was that the mode of execution be as quick and as painless as possible, *and* that it cause as little disfigurement as possible. When one rabbi suggested that the height of the platform should be increased so that death from the fall would be certain, another rabbi responded that raising the platform is unacceptable because a fall from too high a platform would result in disfigurement.

B. "Burning" Was Intended To Be a Quick and Relatively Painless Non-disfiguring Form of Execution.

The Mishna in *Sanhedrin* (52a) also described the procedure for "burning" and stated clearly that it did not involve actual resort to fire or flames. Rather, an extremely hot object (or wick) was inserted into the mouth of the condemned individual so as to cause instantaneous death. Here, too, the objective was to cause death quickly and without mutilation of the body.

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[7] Rabbi Shlomo ben Yitzchak (also known as Rashi) was born in 1040 in Troyes, France, and died in 1105. He is the foremost Jewish commentator on the Bible and Talmud. His commentary, which combines literal and allegorical explanations, appears in all standard volumes of the Bible and Talmud.

Indeed, the Mishna concludes with a very revealing passage that condemns any court that would put an accused to death with actual flames (*id.*; emphasis added):

> Rabbi Elazar the son of Rabbi Tzadok said "An incident once occurred with the daughter of a priest who committed adultery and they surrounded her with bundles of branches and burned her." The other rabbis responded to him, "That was done because the court that performed this execution was not knowledgeable."

The concluding comment of the Mishna indicates that regardless of the common understanding of "burning," the rabbis believed that a court that would actually set a person on fire was a court acting in error. The Talmud, in fact, explains that the incident reported in the Mishna was the work of a court of Sadducees (*i.e.*, those who mistakenly applied the Biblical text without taking account of the oral tradition and rabbinic interpretation). This passage demonstrates once again the rabbis' primary concern that the method of execution not cause unnecessary pain or disfigurement of the body.

C. Decapitation and Strangulation Were Intended To Be Quick and Relatively Painless Forms of Execution.

The Mishna (*Sanhedrin* 52b) describes execution by decapitation – which was invoked primarily for murderers – as the same form of capital punishment that was used at the time by civil rulers under the Roman legal system. The condemned person's trachea and esophagus were severed with a sharp sword so that he would die instantly. When one rabbi of the Mishna suggested that it was too demeaning to the accused to be executed in a standing position because his

body would slump to the floor and that, instead, his head should be positioned on a wooden chopping-block and removed with an ax, the majority of the rabbis responded that this was impermissible because it could result in even greater mutilation.

This discussion on the subject of decapitation reveals again how conscious the rabbis were of the obligations (1) to impose rapid death, (2) to minimize pain, and (3) to avoid mutilation. In actual administration of this form of execution, they sought to achieve these objectives. The discussion of this form of execution was again concluded with the previously cited observation, attributed to one Rabbi Nachman, quoting Rabba the son of Avuha: "Scripture states, 'You shall love your fellow as yourself' so that you must choose for him a humane death." This admonition is repeated in the Talmudic tractates *Pesachim* (75a) and *Ketubot* (37a).

The same principle governed the rules of strangulation. Death is caused by quick and certain choking when a cord around the condemned person's neck is pulled in opposite directions simultaneously by the eye-witnesses to the offense (who are required to participate in the execution). Pain and mutilation are minimized because the cord that is used for the execution is placed within a soft cloth. The Talmud explains that this form of death "leaves no mark on the body."

II

MODERN APPLICATION OF JEWISH LAW IMPLEMENTS THE SAME PRINCIPLES OF HUMANITY AND CONSIDERATION

The State of Israel has abolished capital punishment for all offenses other than genocide, war crimes, crimes against humanity, crimes against the Jewish people, and treason in wartime. The only execution that has taken place in Israel was the execution of Adolf Eichmann, in which the condemned man was hanged.

In an important prisoners'-rights case, however, Deputy President of the Supreme Court Menachem Elon wrote an opinion in which he said (*State of Israel v. Tamir*, 37(iii) P.D. 201 (1983)):

> Jewish Law was particularly insistent on the preservation of even a criminal's rights and dignity during the course of punishment. Maimonides, after dealing with the types of punishment a court may impose, including imprisonment, concludes: "All these matters apply to the extent that the judge deems appropriate and necessary for the needs of the time. In all matters, he shall act for the sake of Heaven and not regard human dignity lightly .... He must be careful not to destroy their dignity." According to Jewish law, a death sentence must be carried out with the minimum of suffering and without offense to human dignity. This is based on the Biblical verse,

> "Love your fellow as yourself," and the rule is, "Choose for him a humane death." From this we declare that even a condemned felon is your "fellow."[8]

Contemporary Jewish Law coincides with the Jewish Law doctrines that governed two millennia ago. It is not permissible to execute a condemned man or woman by means that cause unnecessary pain, delay or disfigurement. Even in the rare case when the State has determined that the accused must be put to death because he or she committed a heinous offense, the condemned is legally entitled to consideration and dignity.

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[8] Justice Elon's opinion in the *Tamir* case, translated into English, is reprinted in full in Elon, *et al.*, *Jewish Law (Mishpat Ivri): Cases and Materials* (Matthew Bender & Co, Inc., New York, 1999) pp. 567-572.

CONCLUSION

If execution by the electric chair, as administered in Florida, results in unnecessary pain and disfigurement, it would be unacceptable under the principles underlying the traditional Jewish legal system applied 2000 years ago, and should also be unacceptable under the Eighth Amendment today.

Respectfully submitted,

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